IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

W. O. JOHNSON,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY,
Respondent.
No. [illegible]

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

W. O. JOHNSON,
Plaintiff in Error,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.
No. 87.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

W. O. JOHNSON,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY,
Respondent.
No. 32.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

W. O. JOHNSON,
Plaintiff in Error,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.
No. 87.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

Statement.

Counsel have agreed that both these cases shall be argued and submitted together. See

stipulation in record of case No. 32, p. 47, and in case No. 87, p. 6.

This is an action for damages for personal injuries sustained by plaintiff—who was a brakeman in defendant's employ—while engaged in attempting to couple a freight engine, equipped with a Janney automatic coupler, to a dining car, eduipped with a Miller automatic coupler, at Promontory, Utah, on the fifth day of August, 1900.

The negligence charged in the petition is the alleged violation of an Act of Congress (27 U. S. Stat. at Large, p. 531) commonly known as the "Interstate Commerce Act," which requires that all *cars* engaged in interstate traffic shall be equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," by failing to equip the engine and dining car, which plaintiff was attempting to couple, with couplers which would couple automatically by impact.

While there was an incidental allegation of a defect in the dining car, it was not an issuable fact in this case, for the reasons hereinafter stated.

As the Act of Congress, referred to, will necessarily receive a large share of this Court's atten-

tion in the consideration of this case, we will here copy so much thereof as is pertinent to the issues involved:

INTERSTATE COMMERCE ACT.

"An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or train brakes, that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

* * * * * *

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorneys information

of any such violations as may come to its knowledge: Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

* * * * * *

"SEC. 8. That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

"Approved March 2, 1893."

The answer was a specific denial of all the allegations of the petition excepting the allegations that the defendant was a common carrier engaged in interstate traffic; that plaintiff was head brakeman of a freight train engaged in interstate commerce, and that the engine was equipped with a Janney coupler and the dining car with a Miller hook coupler, which would not couple automatically by impact. These facts were admitted. The defendant, however, specifically denied that said engine and dining car were being used in moving interstate traffic at the time of

plaintiff's injury, or that it was under any duty to have its engine and dining car equipped with automatic couplers at the time and place of plaintiff's injury, and alleged that whatever injuries plaintiff sustained were the result of his own negligence and carelessness in failing to observe and heed the printed rules and regulations of defendant, a copy of which had been furnished him by defendant, and with which he was perfectly familiar, and in exposing himself to dangers which were obvious and well known to him, but were unknown to defendant because of his neglect of duty. One of said rules was specifically pleaded as follows (Record, p. 9):

RULE 59.

"Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength, and are liable to be broken from various causes, so as to render it dangerous to expose the hands, arms or persons of those engaged in making couplings, all employes are *enjoined* before coupling cars or engines, to *examine* and to *know* the kind and condition of the drawhead, drawbar, link and coupling apparatus, and are forbidden to place in trains any car with

a defective coupling, until they shall have reported the effect to the conductor or yard-master. Sufficient time may be taken by employes in all cases to make the examination required."

No reply was filed to defendant's answer.

The facts developed at the trial were substantially as follows: On the morning of the accident to plaintiff, August 5, 1900, an east-bound through passenger train running between San Francisco and Odgen, being behind time, dropped the dining car "Del Monte" at Promontory, Utah, a small town west of Odgen, in order that it might be picked up by the 5 o'clock P. M. west-bound through California passenger train, as it could not reach Odgen in time to return on that train. As the conductor of the dining car desired to have it turned around, so that the kitchen part thereof would be in the rear of the west-bound train, he had the train despatcher at Ogden telegraph the conductor of a west-bound through freight train running between Ogden and Carlin, to turn the car around. When this freight reached Promontory, where the dining car was standing on a side track, plaintiff, who was head brakeman on this freight train, and an experienced railroad man (as he had been engaged

in railroading about twelve years, six of which were in defendant's service, two years as engine wiper, two years as fireman and two years as brakeman), was directed by the conductor of his train to detach the engine from his train, run it forward and couple it to the dining car and haul it to the turn-table, there to be turned around. In pursuance of this order, he disconnected the engine from the train, ran ahead of it, and threw a switch to let it in on the side track, on which the dining car was standing (Record, p. 14). When the front of the engine reached the dining car, he saw that he could not make an automatic coupling therewith, because the engine was equipped with a Janney coupler and the dining car was equipped with a Miller hook coupler. While both these couplers are automatic in their construction (Record, pp. 14, 20 and 21), they will not work together for the reasons stated by plaintiff himself, "that the Miller hook is on the same side as the Janney, and, instead of coupling, passes over it" (Record, pp. 14 and 23). He, therefore, proceeded to make the coupling with a link and pin, the customary way in such cases. He at the same time observed that the coupler on the dining car was slightly

tipped, by reason of some bolts—which kept the carrying iron on which it rested in place—being loose, which rendered the coupling a little more difficult than it would otherwise have been; but that fact would not have constituted a defect had the car been used in conjunction with another Miller hook coupler, with which it would have worked all right; that while fully conscious of the danger of making such a coupling, he did not regard the slight tipping of the Miller coupler of sufficient consequence to report it to his conductor or the yardmaster, as he acknowledged was his duty, under the printed rules and regulations of defendant, a copy of which he had been furnished with, and with which he was perfectly familiar. As the first attempt to make the coupling failed, he tried it again, and again failed. He then tried it the third time, and his arm was caught between the bumpers and crushed. He stated that he had made the same kind of a coupling a hundred times before and well knew its dangers (Rec.,p.14).

At the close of plaintiff's case, the Court directed the jury to return a verdict for the defendant, which was done. To correct that alleged error, plaintiff sued out a writ of error in the United States Circuit Court of Appeals for

the Eighth Circuit, where the judgment of nonsuit was affirmed and an opinion written by Judge SANBORN which was concurred in by Judges THAYER and LOCHREN. Judge THAYER, however, dissented from that part of the opinion which held that the second section of the Act of Congress did not apply to engines, and that the dining car was not engaged in interstate traffic at the time of the accident, but agreed to an affirmance of the judgment on the ground that the evidence showed that both the engine and dining car were, in fact, equipped with automatic couplers, though of a different pattern, and that, inasmuch as the Act of Congress did not prescribe the kind of coupler to be used, that the equipment of the engine and car with any kind of an automatic coupler was a substantial compliance with the Act. These opinions are reported in the 117 Fed. Rep., 462 and 54 Circuit Court of Appeals, 508. See also printed record, pp. 34 and 45.

This opinion was delivered on the 28th day of August, 1902, and plaintiff in error did not file any petition for a re-hearing, but acquiesced in said ruling until May, 1903, when he filed his petition in this Court for a writ of *certiorari*. On the same day the Interstate Commerce Commis-

sion filed its application for leave to intervene therein. The writ of *certiorari*, was allowed on the 3d day of June, 1903.

ARGUMENT.

FIRST.

The Dining Car was not an Interstate Car.

Our first contention is that, as the dining car was not being used in moving interstate commerce, and plaintiff's act in coupling it had no relation to such use at the time of his injury, it does not fall under the ban of the interstate commerce act. In other words, at that time and place it was not in legal contemplation an interstate car. While we concede that it had been in that service, and might be thus used again, yet we insist that, until so used or in the act of being put into a train for such use, it maintained its local character.

This view is supported by an opinion of the Supreme Court of Virginia in the case of Norfolk, etc., Ry. vs. Commonwealth, 93 Va., 749, 752, in which the character of a train of empty coal cars, which were *en route* to a loading station to be loaded with interstate freight, was

involved. The defendant railroad company had been indicted for running empty cars on Sunday in violation of Section 3801 of the Virginia Code. The defense was that the statute had no application to cars engaged in interstate commerce. It was held that the cars being empty were not then engaged in interstate commerce. The reasoning of the Virginia Court is based upon the decision of this Court in the case of Coe vs. Erroll, 116 U.S., 517, and, as its logic applies with equal force to the case at bar, we can do no better than quote it as a part of our argument on this proposition.

> "The train, which the plaintiff company was indicted for running in violation of Section 3801 of the Code, was made up entirely of empty cars, which, it was agreed, were used exclusively in carrying articles of interstate commerce.
>
> "The fact that they had been so used in the past, and were intended to be so used in the future, does not show that they were, at the time when the act was done, for which the plaintiff company was indicted, engaged in interstate commerce.
>
> "The Supreme Court of the United States in Coe vs. Erroll, 116 U. S., 517, 525, held:
>
> "When the products of the farm or the forest are collected and brought in from the

surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without discrimination in the usual way and manner in which such property is taxed in the State.'

" If this be the true rule by which to determine when the products of the mine become articles of interstate commerce, and cease to be controlled entirely by the laws of the State, why is it not the correct rule to determine when the carrier of such products becomes engaged in transporting interstate commerce, and is protected and governed by the laws of the United States? In the one case the miner may intend to ship a particular product to another State, and may be

preparing the article for shipment, yet it is not an article of interstate commerce *until it starts upon its final destination* to that State, and, until that time, is subject to the laws of the State alone, and has none of the rights of an article of interstate commerce. In the other case, the carrier may be preparing certain cars upon which to transport the products of the miner to the foreign State, and they may be on their journey to the place from which they are to be shipped, yet why should those cars be considered as engaged in interstate commerce until they are loaded with articles committed to the carrier to be transported to another State?

"The reason given for the rule that goods do not become an article of interstate commerce until actually put in motion for some place out of the State, or committed to the carrier for such transportation, is that, until that time, the article, though intended for exportation, may never be exported, as the owner has the perfect right to change his mind at any time. The common carrier has the same right to change his mind and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose, may

never be used. The rule fixed by the Supreme Court in the one case seems equally applicable to the other. Applying that rule to the facts of this case, it would seem that the train for which the plaintiff company was indicted for running, was not, when so running, engaged in transporting articles of interstate commerce, and was, therefore, controlled exclusively by the laws of the State."

The principle enunciated in the Coe-Erroll case has been repeatedly approved by this Court in the following cases:

Turpin vs. Burgess, 117 U.S., 504, 507.

Morgan Co. vs. Louisiana, 118 U. S., 455, 465.

Smith vs. Alabama, 124 U. S., 5, 482.

Kidd vs. Pearson, 128 U. S., 1, 20.

Pullman Co. vs. Pennsylvania, 141 U. S., 18, 25.

Postal Tel. Co. vs. Adams, 155 U. S., 688, 698.

Adams Express Co. vs. Ohio, 165 U. S., 194.

American Ref. Trans. Co. vs. Hall, 174 U. S., 70.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 611, 616.

Diamond Match Co. vs. Ontonagon, 188 U. S., 82;

and followed in these:

U. S. vs. Boyer, 85 Fed., 432.
Cotting vs. Stock Yards Co., 82 Fed., 839, 844, s. c. 183 U. S., 79.
Chicago, St. Paul, etc. Ry. vs. Becker, 35 Fed., 883, 886.
Union Ref. & Trans. Co. vs. Lynch, 18 Utah, 378.
Winkley vs. Newton, 67 N. H., 80, 83.

The mere intention to make a commodity a subject of interstate commerce, does not, of itself, impress the article with that character.

This Court in Turpin vs. Burgess, 117 U. S., 504, 507, said:

> "How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot, for a moment, be contended. It would not be true and would lead to the greatest frauds. * * *
>
> In the present case the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."

If property does not become impressed with an interstate character until it is loaded on cars and moved towards another State,—as held in the Coe-Erroll opinion,—certainly the vehicle by which it is transported ought, for like reason, not to become so until it is laden with interstate freight.

The true distinction between commerce itself and the instrumentalities which produce or transport it, was clearly stated by this Court in Kidd vs. Pearson, 128 U. S., 1, 20, as follows:

> "The legal definition of the term [commerce] as given by this Court in County of Mobile vs. Kimball, 102 U. S., 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The re-

sult would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the northwest, and the cotton planter of the south, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests —interests which in their nature are and must be, local in all the details of their successful management.

"It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details. * * *

"Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those

instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments and more provocative of conflict between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine. * * *

" This court has already decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of interstate commerce within the meaning of Sec. 8, Art. 1, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

The Court then proceeds to quote at large from the Coe-Errol case and the case of The Daniel Ball, 10 Wal., 557, 565, in which latter case it was held that "whenever a commodity has begun to move, as an article of trade, from one State to another, commerce in that commodity between the States has commenced;" but this movement does not begin until the articles have been shipped or started for transportation from one state to the other.

So we say of this car. Until it actually became a part of a train that was employed in the movement of interstate traffic, it maintained its local character just as the freight, referred to in the Coe-Errol and Kidd-Pierson cases did. An illustration will point the distinction. Suppose that the Railway Company, after dropping this car at Promontory, had abandoned its use on its interstate or through trains, and used it only on local trains within the State of Utah: could it then be said to be an interstate car? Clearly not. Then why does not the argument that this Court so forcibly uses in the cases above referred to, viz.: that the fact that the owner or manufacturer of property intends it for exportation, does not give it the character of interstate traffic until it

is loaded on to cars or put in motion for that purpose, because he may, at any time, before that intention is carried out, change his mind, apply as well to the car in this case? It is either the destination of the contents of a car, or of the car itself, when in actual service, as a part of an interstate train, that gives it its character. For instance: if a train,—whose termini was in different states,—should pick up a car loaded with merchandise in one part of a state and haul it to its destination at a point within the same state, and an accident should occur to a brakeman while coupling or uncoupling the car to or from the train, because of the absence of automatic couplers, we do not believe that this Court would hold that the car was an interstate car within the purview of the Interstate Commerce Act, requiring cars engaged in interstate commerce to be equipped with such appliances, even though it were conceded that the car had, at some time, transported interstate freight, and, on this particular occasion, formed a part of an interstate train while being hauled between two points in the same state.

The distinction between the vehicle and commodity of commerce was noticed by Justice

STRONG in the State Tax on Railway Gross Receipts case, 15 Wal., 284, 294, as follows:

> "If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steam-boat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid."

It was likewise observed in Wiggins Ferry Co. vs. East St. Louis, 107 U. S., 365, 374, as follows:

> "In all of the cases just cited the right of a state to tax a ship owned by one of her citizens, and having its *situs* within the state, although used in foreign commerce, or in commerce between the states, was distinctly recognized. Thus, in Passenger Cases [7 Howard, 283] it was said by Mr. Justice MCLEAN: 'A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any

more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property, in some degree, affects its use.' "

It seems to us that the only logical deduction from these authorities is that the character of the vehicle under consideration must be determined by the destination of the commodity with which it is burdened; or, if empty, the purpose for which the train, of which it forms a part, is being moved at the time of the alleged injury. In other words, it must either be loaded with interstate freight or actually be a part of a train which is moving on an interstate mission.

The mere *intention* to use an isolated car standing in a railroad yard for that purpose is insufficient to give it an interstate character. In order to impress it with such a character, it must either be loaded with interstate freight or actually form a part of an interstate train at the time the injury was inflicted, for the reasons stated in the authorities hereinbefore quoted that the mere determination of the mind to do a particular act is not tantamount to its accomplishment, and is too unsafe a guide for the law to follow. It is the accomplished act alone that is

recognized. This must necessarily be so for the reason that nearly every railroad car belonging to a trunk line is, at times, engaged in interstate traffic, and, at other times, only in local traffic. Let us illustrate again: If a brakeman was injured by a car that was loaded at the time with local freight, and constituted a part of a local train operating only in the state, this Court would certainly not hold that the statute under consideration applied to his case; yet, if that same car happened to be loaded with interstate freight and formed a part of a through train that was moving in a continuous voyage from one state to another, it certainly would. What, then, is it that gives the car its character? Is it not the destination of the commodity with which it is laden, or the fact that it is, at the time being, a part of a made-up interstate train? There is no inherent quality in the car itself that indicates its character; but, chameleon like, it changes its hue according to the use to which it is put at any particular time.

See the analogous ruling of this Court in Munn vs. Illinois, 94 U. S., 113, 135, where, in speaking of warehouses, it said:

"They are used as instruments by those

> engaged in state, as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so."

The intention to make the car in question a part of an interstate train might have been abandoned before that train reached Promontory; and, until it actually became a part of that train, its character was colorless. The fact that it had theretofore been used in that service, no more gave it the character of an interstate car than would the fact that an ordinary freight car had often been used in like service, but, at the time of the injury, happened to be loaded with local freight or attached to a local train, give it such a character.

Men's minds are so fickle and the events of life so uncertain that a mere unexecuted intention cannot form a reliable predicate for a legal conclusion any more than the harboring of a criminal intention can constitute a crime.

But plaintiff contends that this is a remedial

statute; and, therefore, invokes the well-known rule that such statutes are liberally construed so as to effectuate the intention of the law-makers. The difficulty in applying this rule to this statute—even if it were conceded that plaintiff's characterization of the statute is correct—is that it would contravene an equally well-known canon of construction—viz., that where a statute *creates* a liability, where none existed before, it must be strictly and literally construed.

Sutherland, in his work on Statutory Construction, Section 371, states this rule as follows:

> "If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act."

It is not and cannot be successfully contended in this case that any duty to equip defendant's engine with automatic couplers existed at common law.

There are other reasons, however, why the construction contended for by plaintiff cannot prevail. Among them is the rule that when language is clear it needs no construction (Yerke vs. U. S., 173 U. S., 439; Thornley vs. U. S., 113 U. S., 310); and that words are to be construed according to their popular sense.

In speaking of a similar contention to that made by counsel in this case, this Court, in the case of Maillard vs. Lawrence, 16 How., 251, 261, said:

> "In instances in which words or phrases are novel or obscure, as in terms or [of] art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension with the inhabitants of this country, there can

scarcely be found terms, the import of which is better understood than is that of the words 'shawl' and 'wearing apparel,' or of 'shawl' as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large the legislature should select for that purpose language by which the nation, or the mass of the people, must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If, therefore, the strange concession were admissible, that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still re-

> main to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language."

The word "car" is an ordinary one which can hardly admit of any misconstruction. There is no ambiguity whatever about it. It means and can mean but one thing, and that is a vehicle designed for the carrying of passengers or freight. Such is its common and popular import.

The word "engine" is equally as common, simple, and popular. Its use conveys to the common understanding a vehicle designed for propulsion, and not for the carrying of persons or property.

There might be a slight semblance of plausibility in the argument that Congress intended tc include engines in the word "car" used in this Act, if it were not for the fact that it employed both the expressions "engine" and "cars" in prescribing the equipment of each. The distinction between these two vehicles is plainly observed in the Act itself, both in its body and title. The Act provides for the equipment of *engines* with power *brakes* and of *cars*

with *automatic couplers.* It must be assumed that Congress was conscious of the fact that it was passing a penal statute when it adopted this Act, and that it knew that particularity and accuracy of expression are the chief requisites of such laws. If it had meant that engines were also to be equipped with automatic couplers it certainly would have said so.

In the case of Bryce vs. Burlington, &c., Ry. Co., 119 Iowa, 274, the Supreme Court of Iowa construed a similar statute according to our contention, saying at page 277:

> "Recurring again thereto, it is manifest that the words 'cars,' used in sections 2079, 2080 and 2082, were used alone advisedly, and for the purpose of distinguishing them from engines and their tenders, because section 2081 of this same act expressly provides for the equipment of all 'engines' with a 'proper and efficient power brake, commonly called a "driver brake",' and, if it had been the legislative intent to require engines to be equipped with automatic couplers in addition to the brake, it would have been so expressed in plain language.
>
> "At the time this statute was originally enacted, no action had been taken by Con-

gress requiring self-couplers and air brakes on all cars used in interstate commerce, and it was a matter of common knowledge that freight cars with all kinds of couplers and drawheads were in use on all of the railroads in the United States, and that cars belonging to the many different roads were widely scattered. Engines must be used in handling these foreign cars, and the increased danger and inconvenience of making a coupling where the engine or tender was automatically equipped and the car to which it was to be coupled was not was undoubtedly in the minds of the legislators. That the distinction which we have pointed out was clearly made and intended is manifested further by the language of sections 5 and 6 of the original act. Section 5 required railroad companies to 'include in their annual report to the state railroad commissioners the number of locomotive engines and cars used in this state, and what number is equipped with automatic power brakes and what number of cars equipped with automatic safety couplers, and the kind of brakes and couplers used.' Section 6 (2083 of the Code) provided that a railroad company 'operating a railroad in this state and using a locomotive engine, or running a train of

cars, or using any freight, way or other car contrary to the provisions of the four preceding sections shall be guilty of a misdemeanor,' the prohibited use of the engine clearly referring to the section requiring a power brake. The last section referred to provides that 'any railway employee who may be injured by the running of such engine * * * contrary to the provisions of said sections shall not be considered as waiving his right to recover damages by continuing in the employ of the company;' hence, if the statute were construed as contended for by the appellee, the question of the assumption of risk would be eliminated from the case. But we cannot so construe it, and, as there was evidence tending to support that claim of the appellant, there was prejudicial error in not instructing thereon, and in not directing the jury that the statute requiring cars to be provided with the automatic couplers did not apply to engines and their tenders."

The language of this Court in the case of Lake County vs. Rollins, 130 U. S., 662, 670, is peculiarly apposite to this case, viz.:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume

that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

Newell vs. People, 7 N. Y., 9, 97; Hills vs. Chicago, 60 Illinois, 86; Denn vs. Reid, 10 Pet., 524; Leonard vs. Wiseman, 31 Maryland, 201, 204; People vs. Potter, 47 N. Y., 375; Cooley, Const. Lim., 57; Story on Const., § 400; Beardstown vs. Virginia, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. United States vs. Fisher, 2 Cranch, 358, 399, Doggett vs. Florida Railroad, 99 U. S., 72."

As the front of the engine was being coupled to this car (Rec., p. 14), no argument can be made on the theory that a *tender* is a car.

The injustice that the adoption of the construction of this Act claimed by plaintiff would work was recognized by this Court in the similar case of U. S. vs. Reese, 92 U. S., 214, 220, 221, wherein it was said:

"If the legislature undertakes to define, by statute, a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know

with certainty when he is committing a crime. * * * The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent, substitute the judicial for the legislative department of the goverment."

The argument that engines are as much within the mischief, which this statute was intended to correct, as cars, and that it should, therefore, apply to them as well, is equally fallacious. It will be seen from the extracts hereinafter quoted from this Court's opinions in the cases of U. S. vs. Harris, 177 U. S., 309, and Sarlls

vs. U. S., 152 U. S., 575, the danger that lurks in expedients of that character. To them may be added the observations of this Court in the case of U. S. vs. Sheldon, 2 Wheat., 119, 122, as follows:

> "It may be admitted that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expressions in the same law."

The plea that the policy of the government calls for a liberal construction of this Act does not aid the plaintiff in his contention, for this Court has said in the case of Hadden vs. The Collector, 5 Wall., 107, 111, that

> "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too

> unstable upon which to rest the judgment of the court in the interpretation of statutes."

And, in St. Paul, etc., Ry. vs. Phelps, 137 U. S., 528, 536,

> " * * * but where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

That this Act was deficient in the particular mentioned is recognized by a legislative declaration of Congress, which, at its last session, and since the decision of this case in the Court below, passed a curative statute extending the scope of the Act so as to include engines as well as cars. See 32 Stats., 943, as follows:

> "AN ACT to amend an Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes,' approved March second, eighteen

hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other loco-

motives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

* * *

"SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act."

Approved, March 2, 1903.

No such legislation would have been necessary, if plaintiff's contention was well founded.

SECOND.

Neither the engine nor the dining car at the time of the injury to the plaintiff below were instruments of interstate commerce.

Whether an engine is an instrument of interstate commerce depends upon the character of the work in which it is engaged at the particular time in question. An engine does not transport or carry persons or property, but hauls cars which transport persons or property. The same test, therefore, is not used in determining whether an engine is an instrument of interstate commerce as is used in the case of a car. An engine is an instrument of interstate commerce if engaged in hauling cars loaded with passengers or merchandise coming from or destined to points in another State. The engine in the present case made a daily run between two points within the State of Utah. It never passed from one State to another, and was an instrument of interstate commerce solely while and entirely because it was hauling cars coming

from California and loaded with merchandise for Utah and other States. When the engine in question pulled into the station at Promontory, Utah, it was no doubt an instrument of interstate commerce, for the reason that it was then engaged in hauling cars loaded with goods which were on their way from San Francisco to Eastern points. Its character, however, as an instrument of interstate commerce by reason of the business in which it was engaged ceased the moment it was uncoupled from the freight train and was no longer engaged in such business. The work which it did after it was uncoupled, was the work which would have been done by a local switching engine at a station in a town of ordinary size. Promontory was a small place and no switching engine was located there. This freight engine when uncoupled from its train was used in place of a switching engine. It was employed in local work, which had no connection with interstate commerce. It was no more an instrument of interstate commerce than any local switching engine which never goes beyond the limits of the railroad yard. It was used to haul an empty dining car standing idle on a side track to a turn table in order that the car might be turned around.

As the character of the work in which an engine is engaged determines whether or not it is an instrument of interstate commerce, and as the engine in this case was engaged in doing the work of a local switching engine at the time the injury occurred, it would seem to be clear that so far as the engine itself is concerned, it was not an instrument of interstate commerce, and therefore did not come within the provisions of the Act of Congress, approved March 2, 1893.

A car is an instrument of interstate commerce if it is actually engaged in carrying persons or property coming from or destined to points in another State. A car in itself has no character either intrastate or interstate. It is, we take it, an instrument of interstate commerce even if it does not pass beyond the boundaries of a State, if it carries goods or passengers in the course of transportation from one State to another.

This is certainly the test established by Mr. Justice FIELD in the case of The Daniel Ball, 10 Wall., 557. There the steamboat plied up and down the Grand River entirely within the boundaries of the State of Michigan. It was, however, held that she was an instrument of interstate commerce because she carried goods brought from

another State and goods destined to another State, and it was held that the true criterion of whether a vehicle of commerce was an instrument of intrastate or interstate commerce was the character of the goods carried by it. It is difficult to see what better test could be applied. A car or a steamboat which carries no merchandise or passengers can hardly be said to be an instrument of commerce of any kind. If the car or steamboat carries only freight or passengers destined from one point in a State to another point in the same State, it certainly is not an instrument of interstate commerce even if the car or steamboat itself passes from one State to another. The sole question therefore is the character of the transportation in which the car is actually engaged and whether the persons or property then being carried are brought from or destined to points in another State. That is to say, before a car or steamboat can be said to be an instrument of interstate commerce, it must have on board of it persons or property received from or destined to points in another State. In the present case, the car was a passenger car, standing idle on a side-track, and having on board no passengers. It is true that it once had been engaged in inter-

state commerce, and an instrument of interstate commerce under the definition which we have given. It however lost its character as an instrument of interstate commerce as soon as it became idle and ceased to carry passengers.

In the case of Chicago, St. P., M. & O. Ry. Co. vs. Becker, 35 Fed. Rep., 883, 886, decided by Mr. Justice BREWER, when Circuit Judge, he declined to pass upon the question of whether a car which was loaded with goods bound for another State, and was being switched upon the side tracks of a station was an instrument of interstate commerce. He stated in his decision that his associate was of the opinion that a car so loaded, while being switched upon the side track in a station was not an instrument of commerce, but he himself did not find it necessary to decide the question.

The present case is of course far removed from the case cited. There the car was loaded with goods destined to another State. Therefore, under the definition given by Mr. Justice FIELD in the Daniel Ball case, it might well have been held to be an instrument of interstate commerce, but in the present case, the car in question was ***not loaded*** but was idle and had no passengers upon it, and

was not being switched for the purpose of then being made up into a train and passing out of the State.

It would seem to be clearly established under the evidence in this case and the decisions of this Court,

1. That the engine was at the time of the accident engaged in the performance of the duties of a local switch engine.

2. That the car was not then an instrument of interstate commerce, because it was standing empty and idle on a side track of a station yard.

3. That the engine was not an instrument of interstate commerce, because it necessarily took its character from the car to which it was coupled and the car in this case not being an instrument of interstate commerce therefore the engine could not be.

We respectfully submit that, under the peculiar circumstances of this case, neither the engine nor the car considered either separately or jointly could be said to have been engaged in interstate commerce or to have been instruments of interstate commerce at the time of the injury to the plaintiff below and therefore the fact that they were not equipped with automatic couplers, which

would couple with each other, did not constitute a violation of the Act of Congress, approved March 2, 1893.

THIRD.

Interstate Commerce Act Does Not Apply.

But, whatever the character of the car may be, there is a more cogent and conclusive reason for the Court's action in giving the peremptory charge to the jury in this case, and that is that the Interstate Commerce Act did not and could not apply to this case.

An examination of that Act will disclose the fact that it applies solely to the equipment of *cars* with automatic couplers and not the engines. Not only the title of the Act, but the Act itself, limits the requirement for couplers to the *cars*.

The first section of the Act provides for the equipment of the *engines* with power or train *brakes*, but nothing is said about couplers.

The second section provides

> "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any *car* used in interstate traffic, not

> equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the *ends of the cars.*"

As the plaintiff was not injured between the ends of cars, but between the front end of an *engine* and a car, it is clear that the Interstate Commerce Act cannot apply to this accident.

As this is a penal statute (see Section 6), it must be strictly construed, and when such construction is given, it fails to reach plaintiff's case.

It is hardly necessary to cite authorities to support this last proposition, but, for sake of illustration, we will quote two.

In United States vs. Harris, 177 U. S., 305, 309, this Court held that "receivers" of railroads were not within the scope of the Act of Congress for the prevention of cruelty to animals by confining in cars and not feeding and watering every twenty-eight hours while in transit, viz.:

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, *based chiefly upon a consideration of the mischief which the legislature sought to remedy*, can

receivers be brought within the terms of the law. *But can such a kind of construction be resorted to in enforcing a penal statute?* Giving all proper force to the contention of the counsel of the Government that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the *language actually used*, interpreted according to its fair and obvious meaning. It is not permited to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

In the case of Sarlls vs. U. S., 152 U. S., 570, 575, it was held that "lager beer" was not included in the designation "spiritous liquors," although it is generally known as an intoxicating beverage. The Court saying:

"Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such

statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice MARSHALL, when in the case of U. S. vs. Wiltberger, 5 Wheat., 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. *It would be dangerous*, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.'"

The evidence in this case, however, shows a complete compliance with the Interstate Commerce Act, as both plaintiff (Rec., p. 14) and his witness Rowland (Rec., p. 22), testified that the dining car was equipped with a Miller-hook coupler and the engine with a Janney coupler,

both of which were automatic devices for the coupling of cars in general use (Rec., p. 23).

As the Interstate Commerce Act does not prescribe the kind of coupler that shall be used on cars, any kind of coupler that possesses the automatic principle is a compliance with the Act. This conclusion is emphasized by the omission of Congress to prescribe any particular kind of coupler in the amendment of this Act, which was passed after the decision of this case, and after its attention had been called thereto by the Interstate Commerce Commission. See 16th Annual Report of Interstate Commerce Commission for 1902, p. 61.

This omission was, no doubt, intentional for the reasons stated by Judge SANBORN in his opinion in this case, viz.: that to have done so would necessarily have created a monopoly in the brand of coupler prescribed, a result which it has been the constant aim of this Goverment to avoid in all branches of trade and commerce.

The common law rule that a railroad brakeman assumes the risk of injury from coupling automatic couplers of different patterns still obtains and was not changed by this Statute. The reasons are well stated by Judge SANBORN, viz. (Rec., p. 42):

"For the reasons which have been stated this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrior engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great trans-continental system of railroad. If the law-makers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind, others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies en-

gaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have know the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car 'not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car.' It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of

all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use."

The occasion which called for the turning of this dining car was an emergency (Rec., pp. 21 and 22), which it would be unjust to hold defendant could not meet, without sending several hundred miles for a *passenger* engine, when a freight engine was close at hand, without incurring a penalty for an infraction of this law. The passenger car presumably was equipped with the kind of automatic coupler that was best

adapted to that service, and the freight engine was presumably equipped with an automatic coupler best adapted to that service. But whether they were or not, there is nothing in the old or new law that prevents the use of different kinds of couplers on passenger and freight trains. A Miller coupler might be admirably adapted for passenger service, yet be wholly unfit for the rougher freight service. So a Janney coupler might be better adapted for freight than passenger service.

As plaintiff himself testified (Rec., p. 14) that he had made hundreds of such Miller couplings, they must have been quite numerous on defendant's road; and, in view of the fact that the coupling that plaintiff was attempting to make was between a *freight* engine and a *passenger* car, it must be presumed that the car was equipped with such a coupler as was in use on passenger trains, and that the engine was equipped with such a coupler as was in use on freight trains.

As plaintiff's cause of action is predicated on this statute, it follows that the trial Court was correct in holding that he had failed to prove his case.

FOURTH.

Plaintiff assumed the risk of injury resulting from the use of couplers of different patterns.

The Courts of this country are unanimous in holding that the risk of injury that a brakeman incurs in coupling cars with couplers of different patterns is one that he assumes by virtue of his employment.

In speaking of the duty of railroad companies to handle cars with drawheads of unequal heights and the dangers and risks that brakemen necessarily incur and assume in coupling such cars, Judge COOLEY, of the Michigan Supreme Court, in one of the earliest cases on this subject (Ry. vs. Smithson, 45 Mich., 212, 220), said:

> "Moreover, the business of the road was of itself, a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great commonway for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation com-

panies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds and he cannot assume as he passes from one to another that the two will be alike, much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive and oftentimes, as above explained, confusing, but it would be a work of supererrogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before, and a man who would not heed the information the very nature and course of the business would impart to him would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; *he needs no printed placard to announce a precipice when he stands before it.*"

In Hodges vs. Kimball, 44 C. C. A., 193, appears a learned dissertation on the risks assumed by brakemen and the effect of their disregard of established rules. It has peculiar application to the case at bar, because of its kindred features.

The case of Whitcomb vs. Oil Co., 153 Ind., 513, 519, is on all fours with the case at bar, the injury there having occurred in substantially the same way as in the case at bar and the plaintiff's version of it corresponding almost precisely with the account given by the plaintiff in this case. The trial Court nonsuited the plaintiff on the ground that he assumed the risk, and its action was affirmed by the Supreme Court. The plaintiff admitted that

> "hundreds of cars belonging to various roads were handled every day. The cars differed in construction in many ways. There were different kinds of drawbars; some automatic, some with spring dogs, some without; some without buffers, some with buffers; and some with buffers set above the draw bar, some below and some on a level. The spring dog in a draw bar would hold the link out horizontally so that it would enter the drawhead of another car of like construction, and the spring dog of the other car would throw the pin into the link, and thus accomplish the coupling automatically. Those without the spring dog were coupled with a link and pin by hand. *A car with automatic device had to*

FIFTH.

Plaintiff's contributory negligence was such as to bar this action.

That the plaintiff fully appreciated the danger he incurred in making this coupling is conclusively shown by his own repeated admissions.

On p. 15 of Record, he says:

> "Yes, sir, I knew what the difficulty of the coupler was, because it was a Janney and a Miller and I most certainly knew it was a difficult coupler."
>
> "It was dangerous to go between those cars, but I was ordered to do it. I knew it was a dangerous coupler, but I was taking my time. I was trying three different times.
>
> "Q. I see you did. When you first went there did you see the condition it was in? A. I seen it was a Miller.
>
> "Q. And a Janney coupler? A. Yes, sir. * * * I went in the first time and failed and saw the difficulties when I did it, but I was supposed to couple it. * * * I gave the engineer the signals and he obeyed them by going and coming, and a second and third time I went in between those cars *knowing the danger*. I was not forced to go in any more than that. I knew the conse-

quences if I did not do the work as I was told to. *I was always instructed to protect myself, but didn't in this case*, because I was ordered to do that coupling."

The only evidence of any ordering was that the conductor told him to go over and turn this dining car around. He admitted that the conductor was not present when he was injured but had gone about doing his other work; that he, plaintiff, had sole charge of the movements of the engine; that the engineer obeyed his signals and that he was master of the situation, there being no superior in charge of or controlling him in making this coupling (Rec., pp. 17 and 20). On page 16 of record he said:

"A. Men lose their lives right along over the same thing.

"Q. That is what I asked you and what I understand you to deny. I asked you if it was dangerous to life for a man to go in there? A. I did not say this one was dangerous to life.

"Q. I am not talking about that. But going in between cars to make this coupling with a pin is dangerous to life or limb? A. It is.

"Q. And you knew that fact? A. I knew it.

"Q. And yet you tried to do this thing three times? A. Yes.

"Q. The only force that was used against you, as I understand you, was that you were instructed by the conductor to perform, to go and turn this car on the turntable? A. Yes sir.

"Q. No hurry about it and no worry about it? A. No sir."

See

San Antonio Traction Co. vs. De Rodriquez, 77 S. W., 420, 422.
Houston, &c., Ry. vs. Martin, 21 Tex. Civ. App., 207.

Plaintiff admitted that he was familiar with defendant's rule 59 and that he agreed to and studied the rules and regulations.

RULE 59.

This rule 59 declared that

"Great care must be exercised by all persons in coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms or persons of

those engaged in making couplings; all employes are enjoined before coupling cars or engines *to examine and to know the kind and condition* of the drawhead, drawbar, link, *coupling* apparatus and are forbidden to place in trains any car with a defective coupling until they *shall* have reported *the defect to the conductor or yardmaster.*" (Record, p. 9).

Plaintiff admitted that he did not report this alleged defect in the coupler to the conductor because it was so slight that he did not think it serious enough to report (Rec., pp. 15 and 18.)

With such admissions as these regarding his knowledge of the dangers of making this coupling, and of the rule just quoted, it is inconceivable how any Court could do otherwise than nonsuit the plaintiff, even if it had held that the defendant had not complied with the provisions of the Act of Congress of March 2, 1893.

In the case of Denver & R. G. R. Co. vs. Arrighi, 129 Fed. Rep., 347 (decided by the Circuit Court of Appeals for the Eighth Circuit, March 18, 1904), it appeared that the railroad company was a common carrier engaged in interstate commerce. The plaintiff was a switchman in the service of the railroad and was injured

while endeavoring to effect a coupling of two narrow-gauge freight cars, one of which was at the time employed in moving interstate traffic. Neither car was equipped with couplers coupling automatically. It therefore became necessary for the plaintiff to go between the ends of the cars in the performance of his duty. In making the coupling his hand was crushed. He brought suit against the railroad company and rested his right to recover solely upon the failure of the defendant to comply with the provisions of the Act of Congress of March 2, 1893, requiring cars used in moving interstate traffic to be equipped with couplers operating automatically. He recovered a judgment in the trial court, which was reversed by the Circuit Court of Appeals, upon the ground that the plaintiff had been guilty of contributory negligence in the manner in which he made the coupling. At page 348, the Court said:

> "Prior to the time when the Act of Congress became fully operative, the employees of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary

risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common-law doctrine of the assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employees shall no longer rest under the burden of that assumption in respect of any car used contray to its provisions. *While this is true, the railroad company is not thereby deprived of the defense of contributory negligence.* With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employee are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employee by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employee himself. The rationale of the doctrine of assumption of risk is not that which supports the rule of contributory negligence. They operate differently and are dependent upon widely different principles. Railroad Co. vs. McDade, 24 Sup. Ct. 24, 48 L. Ed., 96; St. Louis Cordage Co. vs. Miller (C. C. A.) 126 Fed. 495.

> It cannot be assumed that by the passage of a salutory law designed for the protection of those engaged in a hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. *The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements.*"

In speaking of the conduct of a brakeman under similar conditions to those at bar the Supreme Court of Appeals of Virginia in the case of Norfolk, etc., Ry. vs. Emmert, 83 Va., 640, 645, said, quoting plaintiff's testimony:

> " * * * He saw, when he went to make the coupling, that the bumper was not in its right place, and tried to raise it; that it was loose in the collar; that all bumpers are loose in the collar; *but this was about two inches looser than usual;* that the wood had worn away, and this gave it play." (Then proceeding with the opinion.) * * * " It was the special duty of the defendant in error to have noticed the condition of the bumper when he uncoupled it from the train and to have reported it, if, in fact, it was out

of order, and not to attempt to couple cabooses of different heights with a straight link. It was his duty to observe the cars and their couplings, so as to determine, before attempting to couple them, what kind of a link should be used. The evidence clearly shows that the coupling should have been made with a crooked link, and the failure to observe the disparity in the heights of the drawheads, or the miscalculation of the defendant in error as to the necessity for the use of a crooked link to effect the coupling with, in safety, and his failure to use a crooked link for the operation, was negligence on the part of defendant in error, but for which the accident would not have occurred."

So in the case of Brooks vs. Ry., 47 Fed., 687, 688, it was said:

"The only charge of wrong on the part of the defendant upon which the claim for damages in this case rests is in this: that the engine with which the plaintiff was required to work in performing his duties as switchman was improperly constructed and unsuitable for use as a switch engine, the drawhead being so short that a coupling could not be effected without bringing the

tender and the car to be coupled so near together as to leave but an insufficient space for a person to operate safely in coupling them. The plaintiff in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incidental to that situation, including such as were liable to occur in consequence of any visible defect in the machinery and appliances supplied for use in connection with his work. *The alleged defect in this engine was visible*, and should have been, if it was not in fact, known to the plaintiff before he suffered the injury described in this complaint. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it, for he must be regarded as having guaranteed to the defendant his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of locomotive engines, drawheads and coupling apparatus to be able *to recognize*, *upon seeing it*, a dangerous defect of the character described. One of the rules of the company, forming part of the contract which he entered into upon entering its ser-

vice, required the plaintiff to inspect and take notice of the style, construction and condition of the drawheads, links and pins to be used in coupling engines and cars. The plaintiff could not, therefore, have failed to see the drawhead which he claims was defective and unsuitable, in time to have avoided the injury without being guilty of gross negligence and breach of duty. *He controlled the engineer in moving the locomotive* towards the car which was to have been coupled, and he alone, if any one, was to blame for the sudden coming together of the two, whereby he was caught between them and crushed. To me it is too plain to admit of any doubt, that, by the plaintiff's showing it appears that the defendant could not have caused his injury in the manner alleged without such contributory negligence on his part as to preclude a recovery by him of any damages therefor, and it would be error for me to refuse to grant the present motion."

To the same effect is So. Ry. Co. vs. Arnold, 114 Ala., 183, 189, in which it was said:

"The plaintiff, as he himself shows, was experienced in coupling cars, and was familiar with the use of couplers such as were of the pattern used on the cars he

attempted to couple. They were, as he says, of a dangerous kind to couple without the exercise of great care; and that they were dangerous, the injury plaintiff received fully established. *Their danger was known to him, and the peril was obvious.* This called for the exercise of a higher than ordinary degree of care by him, in his attempt to couple them. * * * The injury resulted from plaintiff having placed his hand in a place where it was liable to be hurt, and not from the speed of the train. If he had acted cautiously in the presence of danger obvious to any one attempting to make a coupling under the circumstances and which was well known to him, he would not have been injured, whether the cars came back slowly or rapidly. We cannot do better than to state the rule of contributory negligence as applicable to the case, as Mr. Beach has done: 'The standard by which the plaintiff's negligence is to be measured, is the standard of ordinary care, and the rule is correctly and pertinently summed up in Cremer vs. Portland, by the Supreme Court of Wisconsin (36 Wis. 92): "If the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to pro-

> duce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. * * * Not slight negligence, but any want, however *slight*, *of ordinary* care on the part of a plaintiff, is sufficient to defeat the action." Beach on Cont. Neg., Secs. 20, 21. We are forced to the conclusion that the plaintiff, under the facts before us, was guilty not only of a want of ordinary care to prevent the injury inflicted on him, but he was guilty of very great negligence, which contributed proximately to the injury he received."

The case of Cleary vs. Ry., 66 N. Y. Sup., 568, bears a striking analogy to the one at bar. The only points of difference being that Cleary was injured between two *cars*, while Johnson was injured between an engine and car, and Cleary had only a second or two to exercise his judgment, while plaintiff had unlimited time and the advantage of seeing the effect of two unsuccessful efforts to make the coupling. So the odds were greatly in Johnson's favor.

Yet the Court in the Cleary case affirmed the action of the trial Court in nonsuiting the plaintiff on account of his contributory negligence.

In distinguishing the Cleary case from one relied upon by his counsel the Court said at p. 572:

> "It will be seen that the cause of the accident in that case was the passing of one bumper under the other, and that this danger was one not observed by the plaintiff until it was too late to recede from his dangerous position, and as said in the opinion, the whole transaction was the occurrence of a moment, and the error of the plaintiff was in estimating the danger that confronted him. Here, however, the danger to be apprehended was apparent to the plaintiff; and that he realized it was shown by his statement that he thought that, with care, he could successfully accomplish the task. The distinction between the two cases is that in the Goodrich case the injury resulted from a cause that was unexpected and unforeseen until too late to avert it, while in this case the injury resulted from a cause which was not unexpected but which plaintiff thought he could surmount by the exercise of care. Had he not assumed the risk of placing his hand and arm in a dangerous position, no injury could have happened to him because in this case he was perfectly safe between the cars, the accident being caused, not by

one bumper passing under the other, but by the plaintiff's effort to raise the link in the drawhead of the moving car into the drawhead of the stationary car which was some inches higher. * * * Apart, therefore, from the question of the defendant's negligence, which we have discussed, but not decided, we think that the inference could not reasonably be drawn that the plaintiff was free from contributory negligence. * * * We think, therefore, that the disposition made by the trial judge in dismissing the complaint was right, and that the judgment appealed from should be affirmed with costs. All concur."

As plaintiff admitted he had been furnished with written rules by the company and had read and was familiar with them, his breach thereof precluded him from recovering for his injuries.

Fluhrer vs. Ry., 121 Mich., 212;
Platton vs. So. Ry., 49 C. C. A., 571;
Erie Ry. vs. Kane, 55 C. C. A., 129.

See also K., etc., Ry. vs. Dye, 16 C. C. A., 604, 608, in which it was said:

"There is no pretense that the requirements of the rules were observed by the section foreman in charge of the hand car. It is indisputable that *their non-observance*

contributed to, if it did not occasion the accident, and *even if the defendant was guilty of negligence*—a question upon which it is not necessary we should express an opinion—the section foreman was clearly guilty of contributory negligence, which precludes a recovery in this case, and *the Court below should have so told the jury*."

We, therefore, respectfully submit that the plaintiff was guilty of contributory negligence in not reporting to the conductor in compliance with the provisions of Rule 59 of the Railroad Company, that the coupler on the car was defective, and that such contributory negligence was sufficient to defeat recovery by the plaintiff in this case, even though this court should hold that the defendant below had not conformed to the requirements of the Act of Congress of March 2, 1893.

SIXTH.

The judgment of the Court below should be affirmed.

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MARTIN L. CLARDY,
HENRY G. HERBEL,
Of Counsel for Respondent and Defendant in Error.